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Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Supreme Court of Iowa herein being reviewed is reported in 60 N. W. 2d 110 (Iowa 1953).

The decision of the United States District Court for the Northern District of Iowa, Western Division, remanding the case to the State Court is reported in 102 Federal Supplement 658.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Certiorari was sought and has been granted under the provisions of 62 Statutes 929; 28 U. S. C. A., Section

1257(3) where right, title, privilege, or immunity are claimed under the United States Constitution and under a treaty of the United States Government. On November 20, 1953 the Supreme Court of Iowa, being the Court of last resort, denied the petitioner's petition for a rehearing (R. 48). On February 15, 1954 petition for a writ of certiorari was filed in this Court, and on April 12, 1954 this Court granted certiorari (R. 50).

The specific grounds on which jurisdiction of this Court is invoked are:

1. The case involves rights and privileges claimed under the United States Constitution and under a treaty of the United States Government properly pleaded in all stages of litigation.

2. The Iowa Court has directly and erroneously interpreted the Fourteenth Amendment to the United States Constitution adversely to this petitioner.

3. The Iowa Court has directly and erroneously interpreted the applicability of the United Nations Charter, a treaty of the United States Government, adversely to this petitioner.

4. The Iowa Court has directly and erroneously interpreted the public policy of the United States Government adversely to this petitioner.

5. The precise question of whether a racial restrictive covenant may be successfully raised as a defense to a damage action has never before been determined by this Court, and the decision by the Iowa Court is erroneous and presents a federal question of considerable substance and great public importance.

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

(a) "* * * this constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding * * *."

Article VI, Constitution of the United States.

(b) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

Sec. 1, Amendment 14, Constitution of the United States.

(c) The Preamble and Chapter I, Article 1, Subparagraphs 2 and 3, and Chapter IX, Articles 55 and 56, United Nations Charter.[1]

(d) Civil Rights Act, 8 U. S. C. A. 41, et seq. 8 U. S. C. A., Sec. 42, et seq., 2 F. C. A., Title 8, Sec. 42.[2]

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are whether the Supreme Court of Iowa erroneously ruled that the respondent cem-

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1 Set out verbatim in the Appendix.
2 Set out verbatim in the Appendix.

etery can use a racial restrictive covenant as a defense to this damage action without such ruling becoming a State action in violation of:

(a) The due process clause of the Fourteenth Amendment.

(b) The equal protection clause of the Fourteenth Amendment.

(c) The United Nations Charter, a treaty of the United States Government, and

(d) The public policy of the United States Government.

———o———

STATEMENT OF THE CASE

Sergeant John Rice, who was 11/16ths Winnebago Indian, was killed in action with the United Nations Forces in Korea, and arrangements were made for the return of his body to his home in Winnebago, Nebraska. Thereupon his widow, petitioner herein, arranged for burial in the respondent cemetery in Sioux City, Iowa, made a down payment and signed a printed contract on August 12, 1951 for the purchase of cemetery lots containing a clause granting burial privileges "only to members of the Caucasian Race." (R. 10.)

Thereupon the body arrived from Korea, and on August 28, 1951 funeral services were held in the family church at Winnebago, the funeral procession then went to the respondent cemetery where graveside services were held and the family and friends returned to their homes,

leaving the casket over the open grave with the belief that it would be buried (R. 13). Later that same day respondent notified petitioner of its refusal to bury her husband because he was not a member of the Caucasian Race (R. 3 and 4) and that she would have to make other arrangements, unless she would sign an affidavit to the effect that her husband was a member of the Caucasian Race, which she refused to do (R. 4).

Before final arrangements were made for burial, the President of the United States intervened and made an offer—which was accepted—to have the body sent to Arlington National Cemetery in Washington, where final services were held (R. 4).

On December 12, 1951 petitioner filed this damage action in the District Court of Iowa, in and for Woodbury County, claiming damages for humiliation and mental suffering in the sum of $60,000.00 in each of three separate Counts, later twice amended, and the Cemetery, by answer, claimed its conduct was justified by reason of the racial restrictive clause in the contract, to which petitioner responded that such a clause could not be used as a defense. To avoid confusion resulting from the various amendments, a composite petition (R. 2-15) and answer (R. 15-18) were by agreement filed by the parties after respondent had unsuccessfully sought removal to Federal Court (See 102 Fed. Supp. 658), and after the State Court ruled adversely to respondent's motion to dismiss (R. 18). Thereupon both parties made application for adjudication of law points prior to trial and the Court ruled thereon adversely to petitioner (R. 19-24). Following the Court's adjudication of law points, both

parties joined in an application for an interlocutory appeal to the Iowa Supreme Court, which was denied (R. 24-26). Thereupon respondent sought and received a favorable adjudication on the remaining law points (R. 26-29). Thereafter petitioner appealed to the Iowa Supreme Court, which ruled adversely to petitioner's claim that in allowing respondent to defend on the basis of the restrictive covenant the Iowa Court was committing such State action as is prohibited by the due process and equal protection clauses of the Fourteenth Amendment, the public policy of the United States Government, and the United Nations Charter (R. 30-44). Petitioner then sought rehearing on the same grounds (R. 45), which was resisted (R. 46) and denied (R. 48). On February 15, 1954 petitioner sought certiorari in this Court, and it was granted on April 12, 1954 (R. 50).

———o———

SUMMARY OF ARGUMENT

This argument is divided into four parts and a conclusion.

The first part is devoted to showing that the Iowa Court's ruling under all of the circumstances in this case resulted in a violation of the due process clause of the Fourteenth Amendment, and this for the reason that historically in this country common decency in our government requires that no such discrimination as has been practiced here should be allowed to stand without redress. The rights involved are fundamental human rights, and, with the flexibility intended for constitutional interpretation and with legal precedence, there is justification for holding that the due process clause has been violated.

The second phase of the argument is devoted to the equal protection clause of the Fourteenth Amendment and complains that petitioner has been discriminated against and denied legal rights which would have been afforded to persons under similar circumstances who had married a member of the Caucasian Race. Emphasis is placed on the recent decisions of this Court in *Shelley v. Kraemer, Hurd v. Hodge,* and *Barrows v. Jackson* as being ample legal precedent to support a reversal of the Iowa Court, because its ruling has violated the equal protection clause of the Fourteenth Amendment.

The third phase of the argument is devoted to the applicability of the United Nations Charter and the erroneous interpretation and effect placed upon it by the Iowa Court. Reference is made to Article VI of the United States Constitution and to the Preamble and certain Articles of the United Nations Charter. Reference is then made to the applicable decisions requiring broad and liberal interpretation of treaties. This phase of the argument is concluded by a showing that a broad and liberal interpretation of the United Nations Charter requires a finding that its purposes have been violated by the Iowa Court.

The fourth and final phase of the argument is devoted to a showing that the ruling of the Iowa Court results in a violation of public policy of the United States as shown by the Constitution, acts of Congress, a treaty, and pronouncements by this Court.

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ARGUMENT

May it please the Court:

1. The ruling by the Iowa Court is such State action as is prohibited by the due process clause in the Fourteenth Amendment.

State Courts are subject to all of the mandates in the Fourteenth Amendment.

> *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 672.
>
> *Buchalter v. New York,* 319 U. S. 427.
>
> *Den v. The Hoboken Land & Imp. Co.,* 18 Howard 272, 15 L. Ed. 372.
>
> *Shelley v. Kraemer,* 334 U. S. 1.
>
> *Barrows v. Jackson,* 346 U. S. 249.

The only question is whether the due process clause is applicable to the facts of this case.

This Court has wisely and consistently refused to give a precise definition to the due process clause of the Fourteenth Amendment, indicating instead that what is due process of law depends upon the circumstances and varies with the subject matter and the necessities of the situation.

> *Davidson v. Bd. of Adms. of New Orleans,* 96 U. S. 97.
>
> *Meyer v. Peabody,* 212 U. S. 78.

The question of the applicability of this clause to cases involving racial restrictive covenants has recently been presented to this Court but was not passed upon for the reason that it was not necessary.

Shelley v. Kraemer, 334 U. S. 1.

Hurd v. Hodge, 334 U. S. 24.

Barrows v. Jackson, 346 U. S. 249.

In light of all of the circumstances in this case, petitioner has been denied due process of law under the Fourteenth Amendment for the reason that she has been subjected to the loss of her property rights and mental suffering and humiliation without any redress, contrary to the established and fundamental principles upon which this country was established as announced in its Constitution and in the decisions of this Court.

Throughout the numerous decisions of this Court in a great variety of cases involving the due process clause of the Fourteenth Amendment, various tests are suggested and precedence or lack of it is given little weight since each new case is examined on its own merits. And this Court has held:

> "The 14th Amendment refers to the law of the land of each state, * * * exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions, * * *. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law * * *."
>
> *Hurtado v. People of California,* 110 U. S. 516 at 535.

And in the same case, in discussing the desirability and growth and flexibility, Justice Mathews said:

> "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law * * *. The Constitution of the United States * * * was made for the undefined and expand-

ing future * * * they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property."

Hurtado v. People of California, supra at 531, 532.

That more is required than procedural fairness was recently reiterated by this Court in *Shelley v. Kraemer,* 334 U. S. 1.

In *Twining v. New Jersey,* 211 U. S. 78 at 106, this Court asked:

"Is it of such a nature that it must be included in the conception of due process? Is it a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such a government? If it is, and if it is of such a nature that pertains to process of law, this court has declared it to be essential to due process of law.

" * * * the basic principle that all people must stand in an equality before the bar of justice in every American court * * * under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non conforming victims of prejudice and public excitement * * *. No higher duty, no more solemn responsibility rests upon this court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution of whatever race, creed, or persuasion."

Chambers v. Florida, 309 U. S. 27 at 241.

This Court has held that a statute limiting the right of a property owner to convey his property to a person

of another race was a denial of due process of law (*Buchanan v. Warley,* 245 U. S. 60, 62 L. Ed. 149) for the reason that the discrimination aimed at by the statute violated one of the basic and fundamental concepts of the decency in the American Government. And it has been very recently indicated again by this Court that the equal protection clause and the due process clause are not necessarily interchangeable, even though frequently they are used in that manner, and that school segregation resulted in a violation of the due process clause of the Fifth Amendment (*Bolling v. Sharpe,* 98 L. ed. (Adv. p. 591).

Petitioner does believe most strongly that the ruling of the Iowa Court has deprived her of her property without due process of law and has violated one of the basic concepts of equality and decency which are intended to be covered by the due process clause, particularly when we remember that the Fourteenth Amendment is to be liberally construed (*Byars v. U. S.,* 273 U. S. 28).

2. The ruling by the Iowa Court is such State action as is prohibited by the equal protection clause of the Fourteenth Amendment.

A well-established requirement is that, because the Fourteenth Amendment deals with basic civil and political rights, it is to be liberally construed (*Byars v. U. S.,* 273 U. S. 28), and in making this liberal construction

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action

on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

Shelley v. Kraemer, 334 U. S. 1 at 23.

Stated differently, the question of a violation of the Constitution (Fifth Amendment) is to be determined

"not for any narrow, technical reason but for considerations that touch rights so basic to our system that after the Civil War their protection against invasion by the States was safeguarded by the Constitution."

Hurd v. Hodge, 334 U. S. 24.

That discrimination has resulted in this case as the result of the ruling by the Iowa Court cannot be doubted. No contrary logical analysis can be made. The restrictive clause in the printed contract is on its face discriminatory, and the Iowa Court has given its stamp of approval to that discrimination.

Fortunately it is no longer an open question whether a State or Federal Court can directly enforce such a covenant (*Shelley v. Kraemer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24). By these rulings this Court gave new strength to the equal protection clause. In both of these cases this Court held that judicial enforcement of a racial discriminatory covenant in a deed is prohibited by the Fourteenth Amendment as pertains to State action and by the Fifth Amendment and public policy as it pertains to Federal action.

In citing these cases this Court found no difficulty in recognizing the very basic rights involved, the obvious

discrimination based upon race or color, and that the decision of the State Courts was such State action as was prohibited by the Fourteenth Amendment, and that the decision by the Federal Court in the *Hurd* case constituted a violation of the applicable provision in the Fifth Amendment as well as public policy.

Following these two landmark cases which brought to an end nearly a century and a half of legal approval of discriminatory covenants in deeds in various State Courts, those most directly affected by such rulings attempted to restrict the effect of the Shelley and Hurd rulings by such attempts as seeking damages for violation of the racial restrictive covenant (*Phillips v. Naff*, 52 N. W. 2d 158 (Mich.)). But these attempts to accomplish indirectly what this Court so wisely held could not be accomplished directly were finally resolved by this Court in *Barrows v. Jackson*, 346 U. S. 249. This Court there held that, if a State Court were to allow recovery of damages for violation of the restrictive covenant, it would be such State action as is prohibited by the Fourteenth Amendment, and further stated that the allowance of damages would be:

> "solely for the purpose of giving vitality to the restrictive covenant; that is to say to punish respondent for not continuing to discriminate against non-Caucasians * * *."

The very heart of the decision in the *Barrows* case was that litigants through State Courts could not accomplish indirectly what *Shelley v. Kraemer* held could not be accomplished directly.

Respondent cemetery in this case is attempting to protect itself by using the restrictive covenant as a shield

in this damage action. The Iowa Court by its ruling has made it possible for the cemetery to use the covenant as a defense. The Iowa Court has therefore by its ruling given vitality to the restrictive covenant and is punishing petitioner for her failure to abide by it.

Respondent and the Iowa Court admit that the covenant could not be specifically enforced, but the Iowa Court claims that, since it is neutral (R. 36), it is not lending support to the restrictive covenant. Clearly the Iowa Court has not been neutral and, without the ruling of the Iowa Court, the cemetery would have no legal basis on which to defend its conduct.

Petitioner states again that she is not claiming that contracts with racial restrictive covenants are illegal or unconstitutional in and of themselves, nor is she claiming that, so long as the parties to such contracts voluntarily adhere to their terms, any wrong has been committed. Petitioner's case will not result in the disappearance of cemeteries intended only for members of a particular religious belief or other private cemeteries devoted to particular groups of people.[1]

Just as in the *Shelley* case, we are no longer concerned with voluntary adherence to the terms of a private contract because here as there one of the parties, petitioner, refuses to adhere to it, and the question of that adherence or lack of it is before the Court. The result is that it is no longer just a private dispute because the Court

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1 Neither is petitioner suggesting that the cemetery was compelled to sell the lot to her as was the situation in **Dorsey v. Stuyvesant Town Corp.**, 299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133; certiorari denied 399 U. S. 981.

has been called upon to resolve it, and the Iowa Court cannot either directly under the *Shelley* case or indirectly under the *Barrows* case give its stamp of approval to the covenant, but that is just what the Iowa Court in this case has done.

If petitioner's deceased husband had been a so-called Caucasian, the cemetery's conduct would have been subject to the recovery of damages, but, since petitioner's husband was a part American Indian, the Iowa Court has held that no recovery can be had and that petitioner must bear her humiliation and grief without redress. This is the clearest type of discrimination and can be justified only by use of the restrictive covenant, and the Iowa Court has held that such justification may be used. The Iowa Court has therefore itself violated the equal protection clause in the Fourteenth Amendment.[2]

Interestingly, a Federal District Court in the State of California many years ago correctly analyzed the problem when it said:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden

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2 It is interesting to observe that in 1948 the Texas Civil Appeals Court, in refusing to give judicial sanction to a restrictive covenant forbidding the sale of land to persons of Mexican descent, reasoned that as a result of the litigation it was no longer a question of the voluntary choice of the parties to abide by the covenant but had now become the choice of the State of Texas.

Clifton v. Puente, 218 S. W. 2d 272 (Tex. Civ. App. 1948).

to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the court should no more enforce the one than the other. This would seem to be very clear."

Gandolfo v. Hartman, 49 Fed. 181.

3. The ruling by the Iowa Court is a violation of the United Nations Charter, a treaty of the United States Government.

The Iowa Court quite summarily dismisses this contention by stating that the treaty has no application to the private conduct of individual citizens of the United States (R. 38) and by stating that the treaty does not have the effect of superseding State laws relating to contracts (R. 39).

Article VI of the United States Constitution specifically states that treaties under the authority of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding * * *."

Here then is another constitutional mandate which the Iowa Court has refused to obey, and, if there be any question about it, we will refer to some of the decisions in this Court construing treaties and the effect of Article VI hereinabove referred to.

One of the leading cases for interpretation and effect of treaties is *Missouri v. Holland,* 251 U. S. 415, wherein Mr. Justice Holmes, referring to the Migratory Bird

Treaty between the United States and Canada after a Congressional attempt at control was declared unconstitutional, said in part:

> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. * * * We do not mean to imply that there are no qualifications to the treaty-making power; but that must be ascertained in a different way. * * * and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. * * * *No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power.*" (Emphasis ours.)

It has been variously said that treaties are to be taken in their ordinary meanings as understood in the public law of nations and not any artificial or special sense impressed upon them by local law; *Santovincenzo v. Egan,* 284 U.S. 30; *Geoffrey v. Riggs,* 133 U.S. 58; *United States v. D'Auterive,* 10 Howard 609, 13 Law Ed. 560; treaties should be so construed as to uphold the sanctity of public faith, *Ward v. Race Horse,* 163 U.S. 504; words with plain meaning cannot be rejected as surplusage in treaties, *Foster v. Neilson,* 7 Law Ed. 415; and in construing a treaty its history should be consulted, *Cook v. United States,* 288 U.S. 102.

Treaties are to be construed in a broad and liberal spirit and, where it fairly admits of two constructions, that one is preferred which enlarges rather than limits rights which may be claimed under such treaty.

Bacardi Corp. v. Domenach, 311 U.S. 150.

Jordan v. Tashiro, 278 U. S. 123.

Asakura v. Seattle, 265 U. S. 332.

Shanks v. DuPont, 7 Law Ed. 666.

Geoffrey v. Riggs, 133 U. S. 58.

Treaties are to be construed more liberally than private agreements, and it is permissible to look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Choctaw Indians v. United States, 318 U. S. 423.

Because treaties are solemn obligations entered into between nations for the interest of civilization, and as their main object is to avoid war and secure a lasting peace and promote a friendly feeling, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of perpetual amity.

Tucker v. Alexandroff, 183 U. S. 424.

There can be no question then but that in approaching this phase of our argument the United Nations Charter and its effect and applicability must be viewed with a broad and liberal rather than a confining interpretation. Here the question cannot be whether a treaty can supersede local State laws pertaining to the conduct of private individuals, but rather whether the United Nations Charter was intended to serve as a mandate to the Iowa Court that it could not allow the cemetery to defend this action on the basis of the restrictive covenant in question.

We come, therefore, to the problem of determining the intended effect of the United Nations Charter.

The Preamble to the United Nations Charter, as set forth in full in the Appendix to this argument, states in part as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. * * * "

Chapter 1, Article 1, Subparagraphs (2) and (3) of the Charter state, in part, as follows:

> "The Purposes of the United Nations are: * * *
>
> "2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> "3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; * * * "

Finally Chapter IX, Articles 55 and 56 of the Charter state, in part, as follows:

"Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United Nations shall promote; * * *

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

This Charter, devised and entered into by the greatest minds of the world at the conclusion of World War II, most clearly indicates not only the desire but the necessity that human freedoms be protected without respect to race or creed if international strife such as was suffered in World War II is to be avoided. This Charter, with the high and noble purpose of avoiding war and improving the lot of mankind generally, must be given the broadest and most liberal interpretation possible under the cases hereinbefore cited.

It requires no stretch of the imagination but only a plain reading of the Charter to realize that it was intended to prevent just such discrimination and lack of equality as is apparent in this case. Article 56 above quoted spe-

cifically states that each member nation will take joint and separate action for the achievement of the broad protection of human rights and freedoms without discrimination. It is therefore incumbent upon the United States Government, through its appropriate agencies, to make certain that these fundamental principles are not violated within the boundaries of the United States of America. More explicitly, Article VI of the United States Constitution states most thoroughly that the State Courts are bound by the great purposes of this United Nations Charter, irrespective of anything in the Constitution or laws of that State to the contrary.

It is therefore apparent that the Iowa Court, bound as it was by this solemn treaty of the United States Government, is in error by trying to restrict or limit the meaning of the Charter and by agreeing with the Michigan Court that the Charter was merely indicative of a desirable social trend (R. 39). It cannot possibly be said that the Iowa Court, by the ruling herein complained of, is giving even lip service to the Preamble or Article 55(c) of the Charter, even though it is bound under Article 56 to affirmatively promote the purposes set forth in Article 55.

This is not a novel suggestion and has previously been discussed in such cases as *Perez v. Lippold,* 32 Cal. 2d 711; *Namba v. McCourt,* 153 Ore. 579, 204 Pac. 2d 569; *Curran v. City of New York,* 77 N. Y. S. 2d 206; *Fujii v. California,* 242 Pac. 2d 617; *Sipes v. McGhee,* 316 Mich. 614, 25 N. W. 2d 638. See also 34 Iowa Law Review 1.

More important, this question has been discussed by past and present members of this Court in the case of

Oyama v. California, 332 U.S. 632, where at page 673 Mr. Justice Murphy and Mr. Justice Rutledge in a concurring opinion stated:

> "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."

And at pages 649, 650 Mr. Justice Black and Mr. Justice Douglas in a concurring opinion state:

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

There as here the same question can be asked. How can the United States be faithful to its pledge in solemn treaty with other countries if its Courts, or the Courts of the State of Iowa, given the opportunity presented in this case, do not refuse, both directly and indirectly, to allow respondent to use the restrictive covenant as a shield in this action for damages when the only possible justifica-

tion for the cemetery's conduct is bottomed on racial discrimination?

4. The ruling by the Iowa Court erroneously interprets the public policy of the United States Government.

The Iowa Court has held that there is some doubt as to whether the public policy of the United States is violated by its ruling in this case (R. 40). We fail to understand that doubt because the Iowa Court, citing some of its own cases, indicates that to determine policy we must look to the Constitution, statutes, and judicial decisions (R. 40). That is precisely what we have consistently urged.

The Constitution of the United States clearly prohibits any action by the States which will result in the loss of life, liberty, or property without due process of law, or which will result in denying any person within its jurisdiction equal protection of the laws, all as is shown by the Fourteenth Amendment to the Constitution. The United States Congress has enacted what is known as the Civil Rights Act, 8 U. S. C. A. 42, 2 F. C. A. Title 8, Sec. 42, which is aimed at preventing racial discrimination. Thus we have the Constitution itself and an act of Congress to indicate the public policy of the United States Government, and, if that is not enough to satisfy the Iowa Court, then the United Nations Charter, which is a treaty requiring the member nations to protect its citizens against racial discrimination, should clearly indicate the public policy of the United States.

If there is still some doubt as to what this policy is, the United States Supreme Court has several times announced it:

> "But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States * * *. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power."
>
> *Hurd v. Hodge,* 334 U. S. 24 at 34 and 35.
>
> See also *Shelley v. Kraemer,* 334 U. S. 1.
>
> *Barrows v. Jackson,* 346 U. S. 249.

We therefore have the Constitution of the United States, a treaty of the United States, an act of Congress, and decisions of the United States Supreme Court indicating that the public policy of the United States Government is opposed to such conduct as is herein complained of. In fact, the history of the United States from its organization up to the present time is replete with indications, which have been heard around the world, that any form of discrimination based upon race or color is prohibited.

There cannot be the slightest doubt but that the public policy of the United States has been violated here and the Iowa Court has, by its ruling, offended that policy. This Court, having assumed jurisdiction of this case, should now correct that ruling and re-establish the public policy of the United States Government.

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CONCLUSION

Petitioner has presented four reasons why the ruling of the Iowa Court should be reversed, any one of which standing alone would be sufficient cause for reversal.

We are dealing here with fundamental rights granted to petitioner and others not because of some statute but because individual liberties and common decency demand it. This is basic in the history of the common law and in the history of this Court and has been incorporated into the Constitution of the United States.

A cruel and humiliating thing has been done to petitioner by the respondent cemetery, and yet the Iowa Court has told petitioner that, even though she has been wronged, she has no redress and she must suffer the consequences of having married an American Indian rather than a so-called Caucasian. This is a fundamental issue involving fundamental human rights, and, since no one could even suggest that the cemetery could have committed the same acts without redress if petitioner's husband had been a so-called Caucasian, it is apparent that discrimination because of her interracial marriage is the only logical result of the Iowa Court's ruling. This being so fundamental a right and being so firmly bottomed on discrimination, this Court could well hold with reasoning similar to that found in *Buchanan v. Warley* that due process of law has been denied to the petitioner.

The petitioner has more than lack of due process to complain of. Again because of the very nature of the case and the result of the Iowa Court's ruling, discrimination is involved, and this discrimination is based upon the fact

that Sergeant Rice was part American Indian rather than a so-called Caucasian. This is racial discrimination in its simplest form, and such racial discrimination is clearly prohibited by the equal protection clause of the Fourteenth Amendment. To hold that this terrible thing could be done to petitioner without redress because she married a non-Caucasian, and for no other reason, is the most violent sort of discrimination by the Iowa Court and is therefore such discrimination by the State of Iowa as is prohibited by the equal protection clause.

As said by the Texas Court in *Clifton v. Puente*, it was no longer a question of the voluntary choice of the parties to abide by the discriminatory clause but had now become the choice of the State of Texas. Obviously the parties in this case have not voluntarily adhered to the restrictive covenant and, the matter being in Court, it was the Iowa Court's choice to abide or not abide by the restrictive covenant, and the Iowa Court chose to abide by it, thereby violating the equal protection clause of the Fourteenth Amendment.

Shelley v. Kraemer said that a State Court cannot specifically enforce such a covenant in a deed, and *Hurd v. Hodge* said that the public policy of the United States would be violated if a Federal Court enforced such a covenant. *Barrows v. Jackson* said that a State Court could not allow recovery of damages for refusal to abide by the restrictive covenant on the sound reasoning that what cannot be done directly cannot be done indirectly, and the allowance of recovery of damages would result in giving vitality to the objectionable covenant in question. It is inescapable that the Iowa Court has given vitality to this

restrictive covenant by allowing the cemetery to defend on the basis of it, and such ruling by the Iowa Court violates the equal protection clause of the Fourteenth Amendment.

If more is needed, the United Nations Charter presents but another reason why the Iowa Court should be reversed. Under Article VI of the Constitution, the treaty supersedes State laws and is binding on the Iowa Courts, and under the many decisions in this Court, the treaty is to be given a broad and liberal interpretation.

A broad and liberal interpretation of the United Nations Charter compels the conclusion that the Iowa Court was bound to discredit any attempt at racial discrimination, and in this general type of case members of this Court have agreed.

Finally, if there is still any doubt about the matter, the first three phases of our argument can be combined to give strength to the proposition that the ruling of the Iowa Court is contrary to the public policy of the United States.

There is nothing vague or indefinite or nebulous about the policy involved. It has been announced in the Constitution, it has been announced in an act of Congress, it has been announced by a treaty, and it has been announced by the decisios of this Court, not once but many times, that discrimination because of race, creed, or color is contrary to the public policy of the United States.

Petitioner has been discriminated against, and the only possible justification which either the respondent or the Iowa Court has been able to muster is the restrictive

covenant in the contract. This restrictive covenant discriminates against those who are not members of the so-called Caucasian Race and does nothing else. That is its sole function. A Court which enforces it or allows it to be used as a basis for a damage suit, or allows it to be used as a defense against a damage suit, is giving vitality to that covenant. The Iowa Court has given it vitality and should be reversed.

The decision of the Iowa Supreme Court should be reversed and the case remanded to that court with instructions to take such appropriate action as is needed to conform to this decision with costs in the Supreme Court of Iowa and in this court taxed to the respondent and for such other relief as this court may deem proper.

Respectfully submitted,

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APPENDIX

The Preamble to the United Nations Charter recites, in part, as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. * * * *"

Chapter 1, Article 1, Subparagraphs (2) and (3) of the United Nations Charter read, in part, as follows:

> "The Purposes of the United Nations are: * * *
>
> "2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> "3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for

fundamental freedoms for all without distinction as to race, sex, language, or religion; * * * "

Chapter IX, Articles 55 and 56 of the Charter, reads in part as follows:

"Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United Nations shall promote; * * *

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Civil Rights Act, 42 U. S. C. A., Sec. 1981:

"Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."